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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BERTRAM ANDREWS-POWLEY, III,
PRIVATE FIRST CLASS,
UNITED STATES MARINE CORPS
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES A DUE PROCESS VIOLATION OCCUR WHERE THE PERFORMANCE OF MILITARY APPELLATE JUDGES IS SUBJECT TO PERIODIC EVALUATIONS BY THE JUDGE ADVOCATE GENERAL OF THE NAVY, THEREBY APPEARING TO GIVE THEM A DIRECT, PERSONAL, SUBSTANTIAL, PECUNIARY INTEREST IN THE OUTCOME OF THE CASES THEY REVIEW?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Bertram Andrews-Powley, III, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The decision of the United States Court of Military Appeals, *United States v. Andrews-Powley*, __ M.J. __, No. 94-0572/MC (C.M.A. July 7, 1994), is reprinted as Appendix A at Pet. App. 1a. The unpublished decision of the United States Navy-Marine Corps Court of Military Review, *United States v. Andrews-Powley*, No. 93-1383,

slip op. (N.M.C.M.R. October 27, 1993), is reprinted as Appendix B at Pet. App. 2a.

JURISDICTION

The decision of the Court of Military Appeals was rendered on July 7, 1994. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259 (3) (Supp. 1992).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The relevant provisions of the Uniform Code of Military Justice, Article 37, 10 U.S.C. § 837, and Rule for Courts-Martial 902, are set forth in Appendices C and D at Pet. App. 4a-6a.

STATEMENT OF THE CASE

This petition is brought under Rule 12.2 of this Court's Rules and challenges the Court of Military Appeals' affirmance of petitioner's court-martial conviction on the basis of *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994) (holding that the Navy Judge Advocate General's preparation and signature of the fitness reports of the Navy-Marine Corps Court of Military Review judges did

not deprive that court of its independence or the appearance of independence so as to violate due process). After the Court of Military Appeals decision in *Mitchell*, that Court acknowledged in *United States v. Lewis*, 39 M.J. 280 (C.M.A. 1994) that there were over 300 cases pending wherein appellants asserted that the fitness reporting system of the Department of the Navy deprived the Navy-Marine Corps Court of Military Review of its independence. This petition concerns one of those cases and adopts and incorporates the same arguments set forth in the *Mitchell* certiorari petition (No. 94-174).

Like *United States v. Mitchell*, this petition questions the independence of the judges of the Navy-Marine Corps Court of Military Review in light of the direct, personal, substantial pecuniary interest created by the fitness reports they currently receive. Although civilians are authorized to sit as judges on that court, none currently do, and all of the judges who reviewed petitioner's case were commissioned officers in the Navy and Marine Corps.

As military officers the members of the court receive annual fitness reports which are used as a basis for promotion, future assignments and retention through the Selective Early Retirement Board procedure. These reports are prepared and signed by the Judge Advocate General of the Navy with input from the Assistant Judge Advocate General (Military Justice). This is akin to having state appellate court judges evaluated annually by the State Attorney-General and having those evaluations used by the same Attorney-General to determine whether or not those judges are retained in their position, or are removed, or sent to early retirement. Accordingly, petitioner was denied his due process rights under the Fifth Amendment as well as his right to review by an impartial tribunal under

Rule for Courts-Martial 902. [hereinafter R.C.M.]. Manual for Courts-Martial, United States, 1984.

Within the military justice system, Congress has established a trial court and two levels of appellate courts: the Court of Military Review and the Court of Military Appeals. Judges of the Court of Military Review are appointed by the Judge Advocate General and serve at his pleasure. Review by that court is a right in all cases where an accused receives more than one year of confinement, death, or a punitive discharge. Judges of the Court of Military Appeals are civilians appointed by the President, serving for a term of 15 years. Appellate review is discretionary with that court. Petitioner's case addresses only the Court of Military Review.

As a military officer, each active duty judge on the Court of Military Review receives an annual officer fitness report which grades his performance and ranks him against other officers of the same paygrade serving under the same reporting senior. For all members of the court the reporting senior is the Judge Advocate General of the Navy. Marine Corps officers serving on the court have an additional reviewing officer, currently the Assistant Commandant of the Marine Corps. Navy judges, with the exception of the Chief Judge, are ranked against each other. Marine Corps judges are likewise ranked against each other.

At the time *Mitchell* was reviewed, Marine Corps officers were also ranked against the Assistant Judge Advocate General for Military Justice who prepared the draft reports including proposed rankings. Following the decision of the Court of Military Review in *Mitchell*, which strongly criticized this practice, the Assistant Judge Advocate General's role was changed and he is no longer ranked

against the judges. Recognizing the inherent conflict, the present Assistant Judge Advocate General (Military Justice) has recused himself from the fitness reporting process and does not provide input for the judges' reports.

REASON FOR GRANTING THE WRIT

Although it is clear that members of the military may be subject to some restrictions upon their constitutional rights that are not applicable to civilians, certain guarantees under the Due Process Clause and the inherent right to an impartial forum are not among them. *See, e.g., Parker v. Levy*, 417 U.S. 733 (1974). "[M]en and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." *Weiss v. United States*, ___ U.S. ___, 114 S.Ct. 752, 769, (1994) (Ginsburg, J., concurring). The military judicial system cannot guarantee that these safeguards and protections will not be lost when the judges reviewing cases on appeal are under a cloud of suspicion as to a possible lack of independence. "[J]ustice must satisfy the appearance of justice" if there is to be any confidence in the system. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980).

I. The reasonable observer is the appropriate standard by which to judge an appearance under the Due Process Clause, not the reasonable military judge as applied by the Court of Military Appeals.

Beginning with its decision in *Tumey v. State of Ohio*, 273 U.S. 510 (1927), this Court has consistently held that a criminal defendant is denied due process of law when the judge in his case has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him. *Id.* at

523. In acknowledging that there would be mayors who **could** retain their impartiality as judges, Chief Justice Taft stated that:

> the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would **offer a possible temptation to the average man** as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Id. at 532 (emphasis added). This language was utilized by this Court again in *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972), and more recently in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, ___ U.S. ___, 113 S.Ct. 2264, 2277 (1993). This Court has further held that, "'[J]ustice,' indeed, 'must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Concrete Pipe*, 113 S.Ct. at 2277, (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980)). The question becomes one of whose viewpoint is utilized in determining whether that appearance is satisfied. Petitioner submits that it is the average reasonable "man" observing the system who must be satisfied if justice is to be done.

Relying on the 5th Circuit Court of Appeals decision in *United States v. Couch*, 896 F.2d 78 (5th Cir. 1990), the Court of Military Appeals elected to view the system through the eyes of the reasonable judge. By placing undue emphasis upon the fact that these judges are also military officers, the court created an even more limited test--that of the reasonable **military** judge. By taking such a restrictive view of the due process protections, the court inappropriately restricted the scope of review. This creates a new, narrower scope of due process rights.

Nothing within this Court's opinions discusses the view of the average reasonable **mayor** or **administrator**. Chief Justice Taft's use of the phrase "average man" together with the requirement that the "appearance of justice" be satisfied is consistent with petitioner's position that the vantage point from which that appearance must be weighed is that of an **observer** of the system rather than a **participant**. *Cf. Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847, 865 n.12, (1988) ("[T]his concern has constitutional dimensions...[a] finding by another judge...is unlikely to significantly quell **the concerns of the skeptic**." (emphasis added)).

If the test is the view of the **reasonable military judge**, then the person determining the validity of the system is one who has a stake in its continuation and one who may be intimidated into supporting the system by the very factors which created the appearance problem in the first place. This "fox guarding the hen house" approach can do nothing to enhance the appearance that justice is being done. As this Court stated in *Liljeberg*, "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." *Id.* at 864. On the other hand, by utilizing the reasonable

observer of the system, the person Judge Wiss described as "neither irrationally jaundiced against the fairness of the military justice system nor, just as importantly, dogmatically indoctrinated in support of it," one can truly determine whether the appearance of justice is satisfied. *United States v. Mitchell*, 39 M.J. at 148.

II. When the proper standard is applied in reviewing all of the relevant factors, a reasonable observer would find that the judges of the Navy-Marine Corps Court of Military Review lack the necessary judicial independence required by the Due Process Clause and Rule for Courts-Martial 902(a).

A. A review of all of the factors available to the reasonable observer creates a serious question as to the apparent independence of the Court of Military Review Judges.

The majority opinion of the Court of Military Appeals in *Mitchell* limited its assessment to four facts or circumstances of which a reasonable person would be aware when viewing the current system of justice. This assessment is inappropriate as it not only fails to consider all available factors, but takes an unrealistic view of those factors which were considered.

The first factor is that the reasonable person is "assessing the impact or possible impact. . .on a *military* judge." *Mitchell*, 39 M.J. at 144. The key element focused on by the court was the fact that as a military officer, the judge has sworn to do his duty under the law. No explanation is offered as to why a second oath, similar to the judicial oath would endow the judge with greater resistance to temptation. As Judge Wiss noted, however, "Such chest-pounding adds little to the balance. A similar type of claim that

seems to suggest some sort of inherent integrity may be made of most any judge in most any judicial system in this country." *Mitchell*, 39 M.J. at 148 (Wiss, J., concurring in part, dissenting in part, and concurring in the result). Further, it is that very "militariness" that makes this factor less positive than the court wishes to assume.

As this Court noted in *Weiss,* "the position of military judge is less distinct from other military positions than the office of full-time civilian judge is from other offices in civilian society." *Weiss*, 114 S.Ct. at 760. This recognizes that the emphasis in the position of military judge seems to be on the "military" aspects. The concern that this adds to the equation is that these judges have had 15 to 20 or more years of **military** service prior to assuming their current position. Many years coming up through the ranks have not only trained them to recognize the significance of fitness reports, but also indoctrinated them in the military requirements of obedience to superiors and fulfillment of the "Navy mission." As this Court has noted:

> to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps [citations omitted]. The essence of military service 'is the subordination of the desires and interest of the individual to the needs of the service' [citations omitted]. . . . [T]he habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection.

Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986).

The oath on which the Court of Military Appeals placed such great reliance not only serves to foster the environment in which the "habit of immediate compliance" can become ingrained, but it also obligates these officers to perform duties which could clearly be seen as prosecutorial. "Commissioned officers, for example, have the power and duty to 'quell quarrels, frays and disorders among persons subject to [the UCMJ] and to apprehend persons subject to [the UCMJ] who take part therein.'" *Weiss,* 114 S.Ct. at 759 (quoting Article 7(c), UCMJ, 10 U.S.C. § 807(c) (1984)). While petitioner does not suggest that these functions are inappropriate for a military officer, he does maintain that a long history of performing such duties as well as the formation of a "habit" of obedience must be considered when assessing the question of appearance of independence. Many of these officers, particularly the Marine Corps officers, may have had significant periods of service totally unrelated to military justice, and it is unreasonable to overlook the training and duties which helped shape them for more than a decade prior to their assignment to the court.

The next factor that the court considered is the rulings in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), and *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991), in which the court held that fitness reports could not take into account a judge's findings or sentencing decisions. The court stated that in the absence of evidence to the contrary, it would assume that the JAG and AJAG know the law and would follow it. This position fails, however, to account for the concern noted above as to what criteria are utilized to evaluate an officer whose **sole military duty** for the given period is to make decisions regarding the validity of findings and sentencing handed down at courts-martial. This was clearly a serious concern of the members of the

Court of Military Review, the very people who are affected.

A third factor upon which the court relied to find no appearance was the availability to a judge of "viable remedies to protect himself from untoward influence of the Judge Advocate General or his subordinate." *Mitchell*, 39 M.J. at 145. In addition to the circularity of this argument noted by Judge Wiss, in that a judge with the moral courage and intestinal fortitude to avail himself of those remedies is likely to also be able to resist temptation, and vice versa, the Court of Military Review noted a more serious problem. In the majority opinion the Court of Military Review, after noting the impact even subtle distinctions in grades and narratives may have held that, "For this reason, we place little reliance on these means of redress as a safety net against the improper use of a fitness report." *United States v. Mitchell*, 37 M.J. 903, 915 (N.M.C.M.R. 1993). The reliance by the Court of Military Appeals upon the availability of administrative remedies seems misplaced when the very judges who would need to avail themselves of the remedies lack any confidence in their utility.

The final factor relied upon by the Court of Military Appeals was the failure of any of the judges of the Court of Military Review to express a personal view that either the JAG or AJAG was biased and that Mitchell had failed to show any actual bias on the part of any of the judges in his case. As Judge Wiss noted, if either of these factors did exist then recusal would be clearly mandated but the lack of proof of actual bias "is not much affirmative comfort." *Mitchell*, 39 M.J. at 149. Additionally, this view by the majority appears to require petitioner to show actual harm in order to prevail and as this Court ruled in

Ward, "If this means that an accused must show special prejudice in his particular case, the statute requires too much and protects too little." *Ward*, 409 U.S. at 83.

The majority opinion fails to take into account other factors which would be available for consideration by a reasonable observer, factors such as: former Judge Rubens' perception that his fitness reports **were affected** by his participation in the *Billig* and *Carlucci* opinions; the case of *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991), where the Deputy Judge Advocate General of the Navy and another senior Judge Advocate considered the assignment of a trial judge in the case based upon sentencing practices; and the case of *United States v. Larsen*, No 92-1621 (N.M.C.M.R. May 26, 1994), currently pending appeal to the Court of Military Appeals. In *Larsen*, the court was being asked to overturn rulings of then Military Judge, now AJAG, Colonel Ouelette as well as to find error in post-trial delay committed by the current Assistant Commandant of the Marine Corps, the reviewing officer for the fitness reports of the Marine Corps judges on the court. The findings and sentence were affirmed in a 3-0 opinion.

Lastly, the position of the Court of Military Appeals that there is no possibility that a reasonable person would be concerned with the current system is directly contradicted by the repeated expressions of concern voiced throughout the opinions of both courts, by all involved. The various opinions from the Court of Military Review are replete with expressions of concern for the current system by the various members of the court. With regard to the AJAG's involvement in the process the court stated that "arguably a reasonable observer may conclude that [his involvement]

is inappropriate." *Mitchell*, 37 M.J. at 917. "[W]e acknowledge that such an appearance may exist." *Id.* at 917 n.14. The court also invited the JAG's attention to additional concerns with the system which they noted could contribute to "an unhealthy appearance." *Id.* Judge Mollison concluded that,

> Unless the rating and ranking of appellate military judges is accomplished. . .based on clearly stated criteria. . .(and only with the assistance of persons having no arguable interest, . . .) military appellate review will not enjoy the confidence in its integrity and independence that Congress and the public require. . . . The current rating/ranking system breeds claims of subtle, systemic command influence no less worthy of concern. . . . [N]ow is the time to remove the lingering doubts the current rating/ranking system fosters.

Id. at 921-22. Judge Reed likewise expressed grave concerns over the lack of clear, objective, criteria when he stated that "In the absence of specific objective criteria, '**an objective, disinterested observer** fully informed of the facts **would entertain a significant doubt** that justice was being done' **and would perceive an appearance of command influence.**" *Mitchell*, 37 M.J. at 930-31 (emphasis added).

It is clear that these concerns were shared, in part, by members of the Court of Military Appeals, and at a minimum were noted in the opinions. Judge Wiss was clearly concerned as he specifically quoted portions of the lower court's opinion where the judges noted appearance

problems. He also chose to write separately, dissenting in part from the majority, because he was not satisfied with the majority's cavalier dismissal of problems which he agreed could lead a reasonable observer to question the system. The majority opinion states that "it is obvious to us that *the judges of the Navy-Marine Corps Court of Military Review*. . .are concerned about the fairness of their treatment as professional military officers. We sense dissatisfaction in the Navy appellate judges with respect to their officer-fitness-report system. . . ." and conclude that, "the relief desired *by the Navy appellate military judges* must come by way of legislation." *Mitchell*, 39 M.J. at 145-46. Judge Cox states that he, "like [his] sister and brothers, doubt[s] the services' wisdom in leaving themselves open **to the inevitable charge** that judges are retained in service, promoted in grade, and given future assignments, at least in part, on the basis of some higher-up's approval of their performance as a judge." *Id.* at 147 (emphasis added). Petitioner is left to wonder how nine officers can be concerned with, and be desirous of some form of relief from, that system, and how charges of influence could be "inevitable," if no reasonable observer would have a doubt as to the integrity of that system.

In sum, virtually every appellate judge knowledgeable about the system expressed serious concern about the appearance of unfairness and the potential for abuse. These observations alone create the type of appearance which violates due process and has been condemned by this Court in *Tumey, Ward,* and their progeny.

B. Fitness reports do constitute a direct, personal, substantial, pecuniary interest triggering both the Due Process Clause and the recusal requirements of R.C.M. 902.

"The lifeblood of any officer's career is his efficiency [fitness] report." *Mitchell*, 37 M.J. at 910 (quoting *United States v. Hubbard*, 20 U.S.C.M.A. 482, 485, 43 C.M.R. 322, 325 (1971)). In the opening message accompanying the issuance of the Marine Corps' "User's Guide - How to Write a Fitness Report," (Marine Corps, NAVMC 2794, Fitness Report-User's Guide, June 23, 1986 [hereinafter cited at NAVMC 2794]), then Commandant, General P.X. Kelley said, "[t]he preparation and submission of fitness reports are not merely administrative requirements: they are leadership responsibilities . . . to our Country, to our Corps, to our Marines, and to their families. **I know of no more important document in our Marine Corps.**" NAVMC 2794, introduction (emphasis added).

Fitness reports are utilized for promotion, retention and future assignments. As Judge Reed of the Court of Military Review noted in his opinion:

> Some may argue that the only impact that a fitness report has on a judge is whether a judge makes flag or general officer rank. More is at stake than that. Junior judges hope for a coveted follow-on tour; O-5's hope to make O-6 (although there are no O-5's on this Court today there have been in the past and the Army routinely assigns O-5's to its Court); O-6's hope to avoid involuntary selective early retirement if they are not ready to retire; Marine O-6's may seek the AJAG (Military Justice) billet which in the recent past has allowed an O-6 to retire as an O-7; etc.

Mitchell, 37 M.J. at 930 n.21.

Fitness reports are a particularly potent weapon due to the extreme impact which subtle distinctions may impose in the eyes of a reviewing board. When all members of a given group receive the same grades in specific areas, the commentary becomes the crucial deciding factor. This is supported by Judge Freyer's opinion in *Mitchell* in which he notes that the comments contained in the narrative section of a fitness report can be made "virtually inscrutable." *Id.* at 920. He continues:

> As I pointed out in the *Mabe* [30 M.J. 1254 (N.M.C.M.R. 1990)] [N] concurrence:
>
> > Moreover, whereas, in the past, nearly all circuit judges had already attained the grade of O-6, many now are, or shortly will be, O-5's competitive for O-6 in a highly selective environment, who understand perfectly that, with respect to their own fitness reports, the least adjustment in the rankings or **slightest nuance in a narrative could make the difference between selection and passover**.
>
> 30 M.J. at 1275. As it turns out, that may have been an understatement, for I was once informed by a member of a selection board which considered an officer on whom I had written fitness reports that **those reports, which I had intended to be superlative, were deemed less so because key phrases**

> **in the superlative comments I had written were not underlined.** The truth is that the Board for Correction of Military/Naval Records and Article 138 simply are not calibrated to respond to nuances and codes which are instantly recognizable by selection boards, and **anyone seriously concerned with judicial independence needs to understand this.**

Id. (emphasis added). The majority also noted the real danger of "damning with faint praise" when it stated:

> [W]e recognize the severe limitations of these means of redress. **Retribution by fitness report need not be blatant to be effective.** In today's professional atmosphere of intense competition for promotion and retention in the Navy and Marine Corps, **even the most subtle shading of grades or narrative comment** in a report **can signal the end** of an officer's march up the ladder of success. Yet, these subtleties may not provide a sufficient basis for relief through the methods listed above, but, **if misapplied, constitute as much a threat to judicial independence as the more blatant variety.**

Mitchell, 37 M.J. at 915 (emphasis added). It is this very subtlety and these fine distinctions which may make all the difference in whether an officer gets selected for promotion, or at the other extreme, "selected" for early retirement.

Because of this broad impact, fitness reports can, and do, have a direct effect on the economic well-being of an officer. Loss of a promotion carries not only the immediate loss of current pay increases, but will carry larger, long-term loss in retirement pay. (The difference in annual income between an O-5 and an O-6 means an annual loss of $6,145.20, the difference in long-term retirement pay amount to $81,338.40 over a 20 year period.)* Likewise, selection for early retirement can mean a loss of thousands of dollars over a period of years as well as the immediate one-half reduction in income. (An O-6, who wished to retire at 26 years but was selected to retire at 22 years, loses four years of full salary totalling $312,557.28, as well as $9,955.12 per year in lower retirement pay.) For senior O-5's, Selective Early Retirement Boards may provide a "double whammy" by cutting off both the opportunity for promotion and several more years of service with the accompanying increase in retirement pay. (The loss to an O-5 forced to retire at 20 years rather than promoting to O-6 and retiring at 26 years is $454,277.52 in regular income plus $17,830.08 per year in retirement income.) This certainly creates a direct, personal, substantial, pecuniary interest in obtaining favorable reports.

This potential to influence an upcoming decision which will lead to an increased monetary benefit places the judges of the Court of Military Review in a position very similar to that of Justice Embry in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), in which this Court found his participation inappropriate where the decision in the case

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*The calculations are set forth in Appendix E, Pet. App. at 7a. They are based upon the 1994 pay scale for officers with dependents. No provision has been made for the effect of the variable housing allowance as that amount is dependant upon the officer's geographic location.

had the **potential** to impact upon settlement negotiations in a separate case, with a different insurance company, in which Justice Embry was a party. The nature of the pecuniary interest is at least as strong and direct in this case, and possibly more so since a "poor" fitness report can lead to, in essence, the loss of a job, not just a lawsuit.

C. The reasonable observer could find that the Judge Advocate General and the Assistant Judge Advocate General (Military Justice) have interests within the military justice system which are opposed to those of the petitioner and other military servicemembers whose cases are being reviewed.

The Judge Advocate General is the chief legal officer for the Navy. His responsibilities require him to "wear many hats," at least some of which may be at odds with the interests of an accused facing court-martial or on appellate review. In *Tumey,* this Court held that, "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, **necessarily involves a lack of due process** of law in the trial of defendants charged with crimes before him." *Tumey*, 273 U.S. at 445 (emphasis added). Even though that finding related specifically to the person **hearing** the case, the rationale behind it, in terms of appearance, is equally appropriate when viewing the role of the judge's **supervisor**. This is particularly true in the context of this case where the supervisor's opinion can have a substantial impact upon the future of a judge.

In ruling on the question of judicial tenure within the military, this Court stated in *Weiss v. United States*, that the Judge Advocate General has no interest in the outcome of particular cases. *Weiss*, 114 S.Ct. at 762. While this

may well be the case for the routine guilty plea to an unauthorized absence, petitioner respectfully maintains that, periodically, certain cases arise which are of such high visibility or sensitivity that they may well come to his attention. These are the cases which are ripe for well-meaning comments, intended to serve the interests of the Navy, which could inadvertently bring pressure to bear upon a judge concerned for his future.

The events at the 1991 Tailhook Convention led to the "retirement" of the Judge Advocate General and the Deputy Judge Advocate General who was the head of the Naval Investigative Service.** In 1988, the Court of Military Review set aside findings of guilty in a case involving gross medical malpractice. *United States v. Billig*, 26 M.J. 744 (N.M.C.M.R. 1988). Following this decision an investigation was undertaken by the Inspector General who attempted to look into the deliberation processes of the court. Far from taking the "protective role" attributed to him, the Judge Advocate General ordered the judges of the court to speak with the Inspector General's staff. The members of the court were forced to seek relief from the Court of Military Appeals. *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988). Although in that instance, the members of the Court of Military Review were willing to take a stand, and to seek available remedies, at least one member felt that he paid dearly for that action. *Mitchell*, 37 M.J. at 914 n.12.

** *See* Rowan Scarborough, *Tailhook snags 3 admirals; All leaving posts in naval scandal.*, Washington Times, September 25, 1992.; John Lancaster, *Pentagon Blasts Tailhook Inquiry; Navy leadership faulted in Scandal*, Washington Post, September 25, 1992.

These two examples are not unique. Recent history shows that high ranking officers continue to be susceptible to political pressure and the urge to "protect" the interests of some at the expense of others.*** Nor is this a new phenomenon. As Judge Wiss noted,

> [T]he. . .decisions of this Court for the past four decades are peppered with instances of honorable persons--line officers, lawyers, judges, and even high-ranking officers of the Judge Advocate General's Corps--who affected the trial or appeal of cases in ways in which they undoubtedly at the time believed were permissible but which this Court ultimately condemned. Parenthetically, while our reasonable person knows that violation of this sworn duty "could. . .expose these military officers to criminal liability under the Uniform Code of Military Justice," 39 M.J. 144-145, our reasonable person also knows that there is *no* reported prosecution of *any* of the transgressions just mentioned.

Mitchell, 39 M.J. at 148-49.

In addition to the above, a more general concern, as it pertains to the issue at hand, would be the Judge Advocate

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***See Court Says Navy Brass Shielded Official's Son*, Washington Post, June 15, 1994; *Military Court Sharply Rebukes Favoritism in Navy Fraud Case*, N.Y. Times, June 16, 1994. Rear Admiral LeGrand, newly appointed Deputy Judge Advocate General, and another senior Judge Advocate were among those involved in obtaining lenient treatment for the son of former Navy Secretary, H. Lawrence Garrett, III. The position of Deputy Judge Advocate has traditionally been a stepping stone to appointment as the Judge Advocate General.

General's strong interest in the smooth operation of the military justice system as a whole, an operation which would be jeopardized by the routine reversal of cases at the appellate level. This consideration was noted by the Court of Military Review when they acknowledged that:

> an important aspect of the JAG's interest in the administration of the military justice system is that it operate efficiently, i.e., that it support rather than detract from the operational efficiency of the service. Decisions of this Court which set aside any portion of the proceedings below may impede that efficiency.

Mitchell, 37 M.J. at 913. Therefore, on a larger scale, the interests of the Judge Advocate General are best served by cases being affirmed on appeal--an interest directly opposed to that of the petitioner and all other accused who come within the military justice system. It is these concerns (high visibility cases, systemic efficiency) which the Court of Military Appeals failed to adequately address, and which form a strong basis upon which a reasonable observer might reach a finding of potential bias on the part of the Judge Advocate General.

The Assistant Judge Advocate General for Military Justice is more directly involved in the military justice process. His duties include supervising the criminal law division, reviewing all military appellate court decisions for systemic malfunction, and being responsible for the administrative processing of courts-martial. *Mitchell*, 39 M.J. at 134-35. The Court of Military Review specifically found that at times its decisions may disapprove service-wide policy previously approved by the Assistant Judge

Advocate General in his supervisory role over the criminal law division. *Mitchell*, 37 M.J. at 917. The court went on to state that:

> [A]lthough we find nothing *actually* inimical to our independence in this arrangement, arguably a reasonable observer may conclude that it is inappropriate for an officer whose duties do not include supervising the Court's judges, but whose professional responsibilities are so *directly* and *closely* affected by the Court's decisions, to participate in the evaluation of the appellate judges.

Id. Thus the Court of Military Review recognized that, even if the Judge Advocate General does not, the Assistant Judge Advocate General frequently has a direct interest in specific cases. This finding by the Court of Military Review was essentially ignored by the Court of Military Appeals which simply concluded that the AJAG "is neither a prosecutor nor aligned with the Government as a result of his duties." *Mitchell*, 39 M.J. at 138. Given the Assistant Judge Advocate General's involvement in the drafting of the fitness reports of the judges, particularly when he was also ranked against them, his interest creates a clear conflict for the members of the court which violates Due Process requirements as established by this Court in *Tumey* and *Ward*.[****]

[****] Petitioner notes that following the decision of the Court of Military Review in *Mitchell*, the AJAG ceased to be ranked against the Marine Corps members of the court, nor did he continue to provide recommendations regarding the ranking of those members.

III. The Court of Military Appeals inappropriately restricted the issue presented thereby unconstitutionally increasing the burden on petitioner.

An analysis of Due Process requires a balancing of interests between those of the individual and, in the case of the military, the deference to be accorded Congress. The question presented to the Court of Military Appeals was whether the preparation and signing of Navy-Marine Corps Court of Military Review judges' fitness reports **by the Judge Advocate General** created an actual or apparent lack of independence on the part of those judges. In ruling that the civilian Constitutional standard was not applicable to Mitchell's case, the court stated that, "we need only decide whether the appearance factors favoring appellate military judges **without these Naval officer-fitness reports** 'are so extraordinarily weighty as to overcome the balance struck by Congress' and the Department of the Navy." *Mitchell*, 39 M.J. at 137 (emphasis added). In so doing, the court **assumed** that Mitchell's interest would be satisfied only by totally doing away with fitness reports on the judges of the Court of Military Review. The proper question in this context is whether the appearance factors favoring **the Judge Advocate General and Assistant Judge Advocate General's preparation** of appellate military judges' fitness reports are so extraordinarily weighty as to overcome the balance struck by Congress. This allows for the possibility of several solutions, not all of which interfere with requirements established by Congress or the Service Secretary.

Using the question as framed by the court, the burden on petitioner is greatly increased as he must prove that the problems are so severe as to require the wholesale abandonment of the Navy Officer fitness reporting system, at

least as it pertains to appellate court judges. The Court of Military Appeals required this to be balanced against Congressional and service interests in having some means of evaluation and accountability for these military officers who happen to be serving as judges for a short period. Because fitness reports are required by Navy Regulation, this limitation of the issue requires petitioners to overcome the strong judicial deference accorded statutes and regulations pertaining to the Armed Forces. On the other hand, the only basis the court could find for the JAG and AJAG's involvement in the preparation of the judge's fitness reports was to draw a conclusion based upon the administrative relationship set forth in the Organization Manual of the Office of the Judge Advocate General which "describes the Court as a 'field activity' of the JAG and states that the Chief Judge 'reports' to the JAG." *Mitchell*, 37 M.J. at 909 n.5.

Weighing the balance as argued by petitioner allows the court to consider possible alternatives that would be less intrusive upon the role Congress plays while preserving the due process rights of servicemembers. When analyzed in this way, utilizing the appropriate standard, and allowing for alternative remedies such as requiring clear criteria, or changing the reporting senior to someone wholly outside the military justice system, petitioner's argument is even more compelling.

CONCLUSION

"[T]he parade of horribles now is documented, and the cries for reform appear to be compelling." *Mitchell*, 39 M.J. at 150 (Wiss, J., concurring in part, dissenting in part, and concurring in the result). There is no doubt of the

potential for fitness reports to "subvert military justice." This was recognized by the Court of Military Appeals in *Mabe* and *Graf*, and by Congress when they enacted Article 37 of the Uniform Code of Military Justice. Significantly, the Court of Military Review stated that the current system does not "'transgress' the appellant's right to have his appeal heard by an independent judicial body *if* there are adequate assurances within the military justice system that those reports will not be based upon nor influenced by judicial opinions and rulings." *Mitchell*, 37 M.J. at 912-13. These assurances simply do not exist in the present system. As Judge Wiss noted:

> [T]he picture is far from focused as to what are the criteria on which appellate judges are rated--officers whose full-time job is to make findings and sentencing decisions. More than one judge below expressed pointed concern in this regard. *See infra*. I cannot help but wonder whether our reasonable person would be so fully assuaged as the majority when faced with the fact that, while judges cannot lawfully be rated on their findings and sentencing decisions, year in and year out they are rated against some criteria and on *some* basis--the nature of which even the appellate judges below in the case expressed uncertainty and reservations.

Mitchell, 39 M.J. at 149 (Wiss, J. concurring in part, dissenting in part, and concurring in the result). In the absence of clear objective ranking criteria, and evidence that effective means of redress exist whereby senior officers who break the rules will be disciplined, the present system does not provide the needed assurances to satisfy

due process. Accordingly, the Court should issue a writ of certiorari to address this important issue of law.

Respectfully submitted,

HOWARD BARRY GOODMAN
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Counsel for Petitioner

October 5, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 94-0572/MC
CMR Dkt. No. 93-1383

UNITED STATES, APPELLEE

v.

BERTRAM ANDREWS-POWLEY, III (589-44-8271),
APPELLANT

On consideration of the granted issue (Daily Journal May 25, 1994) in light of *United States v. Mitchell*, 39 MJ 131 (CMA 1994), and *United States v. Lewis*, 39 MJ 280 (sep. op.) (CMA 1994), it is by the Court this 7th day of July, 1994

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (THOMPSON)
Appellate Government Counsel (KEGELMEYER)

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW
BEFORE

ALBERT A. REED T. A. LAWRENCE
WILLIAM A. DeCICCO

UNITED STATES

V.

Bertram ANDREWS-POWLEY, III, 589 44 8271
Private First Class (E-2), U.S. Marine Corps

NMCM 93 1383 Decided 27 October 1993

Sentence adjudged 9 March 1993. Military Judge: D. A. Anderson. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Combat Engineer Battalion, 2d Marine Division, FMF, Camp Lejeune, NC 28542-5522.

CDR K.D. SMITH, JAGC, USNR, Appellate Defense Counsel
LT J.M. KEGELMEYER, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignments of error,[1] and the Government's reply thereto, and we have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2412 (1993); *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Mitchell*, 37 M.J. 903 (N.M.C.M.R. 1993) (en banc). Accordingly, the findings of guilty and the sentence as approved on review below are affirmed.

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[1] I. THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS NOT APPOINTED TO A FIXED TERM OF OFFICE. (CITATION OMITTED.)

II. THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. (CITATION OMITTED.)

III. THIS COURT DOES NOT HAVE POWER TO REVIEW THIS CASE BECAUSE ITS JUDGES ARE NOT APPOINTED TO A FIXED TERM OF OFFICE. (CITATION OMITTED.)

IV. THIS COURT HAS NO POWER TO REVIEW THIS CASE BECAUSE ITS JUDGES ARE DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. (CITATION OMITTED.)

V. THE JUDGE ADVOCATE GENERAL OF THE NAVY'S PREPARATION OF NAVY-MARINE CORPS COURT OF MILITARY REVIEW JUDGES' FITNESS REPORTS VIOLATES PETITIONER'S [sic] RIGHT TO AN IMPARTIAL JUDICIAL FORUM. (CITATION OMITTED.)

APPENDIX C

Relevant portions of the Uniform Code of Military Justice [UCMJ]

UCMJ Article 37, 10 U.S.C. § 837 Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a

member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

APPENDIX D

Relevant Portions of Rule for Courts-Martial 902, Manual for Courts-Martial 1984

Rule 902. Disqualification of military judge

(a) *In general.* Except as provided in subsection (e) of this rule, [concerning waiver] a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

APPENDIX E

An officer in paygrade O-5, with 20 years of service has a monthly income of $5502.26 ($4579.50 base pay + $780.30 basic allowance for quarters [BAQ] + $142.46 basic allowance for subsistence [BAS]). This works out to an annual income of $66,027.12.

An officer in paygrade O-6, with 20 years of service has a monthly income of $6014.36 ($5062.20 + $809.70 + $142.46) and an annual income of $72,172.32.

The lost income from a failure of selection is $6,145.20.

******

An officer in paygrade O-5 who retires at 22 years receives 55 percent of his base pay or $31,280.04 annually ((55% x $4739.40) x 12).

An officer in paygrade O-6 who retires at 22 years receives 55 percent of his base pay or $35,346.96 annually ((55% x $5355.60) x 12).

The annual difference in salary is $4,066.92. Over a 20 year period this would amount to a loss of $81,338.40 to the officer in paygrade O-5 who failed to promote to O-6.

******

An officer in paygrade O-6 who is involuntarily retired at 22 years would receive 55 percent of his base pay or $35,346.96 annually (see previous section).

An officer in paygrade O-6 who retires voluntarily at 26 years would receive 65 percent of his base pay or $45,307.08 annually ((65% x $5808.60) x 12). He would also have received 4 additional years of full salary totalling $312,557.28.

Yrs	Base Pay + BAQ + BAS	Annual Salary
23	($5355.60 +$809.70 + $142.46) x 12 =	$ 75,693.12
24	($5536.80 +$809.70 + $142.46) x 12 =	$ 77,867.52
25	($5536.80 +$809.70 + $142.46) x 12 =	$ 77,867.52
26	($5808.60 +$809.70 + $142.46) x 12 =	$ 81,129.12
	TOTAL	$312,557.28

******

An officer who is involuntarily retired at paygrade O-5 with 20 years of service would receive 50 percent of his base pay or $27,477.00 annually ((50% x $4579.50) x 12).

An officer who voluntarily retires at paygrade O-6 with 26 years of service would receive 65 percent of his base pay or $45,307.08 annually (See previous section). In addition, he would have received paygrade and longevity increases as part of a full salary for an additional 6 years totalling $454,277.52 (assuming selection to O-6 at 22 years of service).

Yrs	Base Pay +	BAQ	+ BAS		Annual Salary
21	($4579.50	+ $780.30	+ $142.46)	x 12 =	$ 66,027.12
22	($5355.60	+ $809.70	+ $142.46)	x 12 =	$ 75,693.12
23	($5355.60	+ $809.70	+ $142.46)	x 12 =	$ 75,693.12
24	($5536.80	+ $809.70	+ $142.46)	x 12 =	$ 77,867.52
25	($5536.80	+ $809.70	+ $142.46)	x 12 =	$ 77,867.52
26	($5808.60	+ $809.70	+ $142.46)	x 12 =	$ 81,129.12
				TOTAL	$ 454,277.52

Supreme Court, U.S.
FILED
NOV 10 1994
OFFICE OF THE CLERK

No. 94-605

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1994

BERTRAM ANDREWS-POWLEY, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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6 pp

QUESTION PRESENTED

Whether the Judge Advocate General's role in preparing fitness reports for military officers who serve as judges on the courts of military review undermines the independence of those judges and renders petitioner's convictions invalid under the Due Process Clause.

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-605

BERTRAM ANDREWS-POWLEY, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the Court of Military Appeals (Pet. App. 1a) and the decision of the Navy-Marine Corps Court of Military Review (Pet. App. 2a-3a) are unreported.

JURISDICTION

The decision of the Court of Military Appeals was issued on July 7, 1994. The petition for a writ of certiorari was filed on October 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993).

STATEMENT

The Judge Advocate General of the Navy is the principal legal officer for that military service. He assigns other commissioned officers to serve as judges of the Navy-Marine Corps Court of Military Review. In accordance with Department of the Navy regulations, he also submits fitness or efficiency reports respecting those officers. Navy regulations require preparation of fitness reports for all of the Navy's commissioned officers. The reports describe an officer's performance and conduct during the reporting period and form a basis for determining his retention, promotion, and future assignments. A typical report consists of a checklist evaluation in several key areas of performance, a narrative summary of the officer's accomplishments during the reporting period, and a comparative ranking with other officers of the same pay grade in the same organization.

Petitioner, a convicted service member, contends that the Judge Advocate General's role in preparing fitness reports for military officers who serve as judges on the courts of military review undermines the independence of those judges and renders petitioners' convictions invalid under the Due Process Clause. The United States Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) rejected that challenge on the basis of its previous decision in *United States* v. *Mitchell*, 39 M.J. 131, cert. denied, 15 S. Ct. 200 (1994) (No. 94-174), which specifically addressed the question.

ARGUMENT

Petitioner urges this Court to review the Court of Military Appeals' decision rejecting his challenge to the Judge Advocate General's role in preparing fitness

reports for military judges. He adopts and incorporates the arguments set forth in the petition for a writ of certiorari in *United States* v. *Mitchell*, *supra*. See Pet. 3. As we explained in our brief in opposition in *Mitchell*, the Court of Military Appeals correctly concluded that the Judge Advocate General's role in preparing fitness reports for military officers who serve as judges on the courts of military review does not offend due process.* The Court of Military Appeals' ruling in *Mitchell* is consistent with this Court's recent decision in *Weiss* v. *United States*, 114 S. Ct. 752 (1994), does not conflict with any decision of this Court or another court of appeals, and does not otherwise warrant review. The decision in this case simply follows the Court of Military Appeals' decision in *Mitchell* and does not provide any additional basis for this Court's examination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOSEPH COMPOSTO
Colonel, USMC

BRIAN B. RIPPEL
Lieutenant, U.S. Naval Reserve
Appellate Government Counsel
Appellate Government Division
Navy-Marine Corps Appellate Review Activity-JAG

NOVEMBER 1994

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* We are providing counsel in this case with a copy of our brief in opposition in *Mitchell*.